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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 909

VERNON L. PEPERSACK,
WARDEN, MARYLAND PENITENTIARY,
Petitioner,

v.

LEONARD HALL, JR.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

THOMAS B. FINAN,
Attorney General of Maryland,

ROBERT F. SWEENEY,
Assistant Attorney General
of Maryland,
1201 Maryland National
Bank Bldg.,
10 Light Street,
Baltimore 2, Maryland,
Counsel for Petitioner.

The Daily Record Co., Baltimore 3, Md.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Vernon L. Pepersack, Warden of the Maryland Penitentiary prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on January 17, 1963.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, dated January 17, 1963, is not yet reported at the time of this Petition, and a copy of said opinion is attached hereto as Appendix A. The District Court opinion, *Hall v. Warden*, 201 F. Supp. 639, is reproduced herein as Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254[1].

QUESTIONS PRESENTED

I. Whether the decision of this Honorable Court in the case of *Mapp v. Ohio*, 367 U.S. 643 (decided June 19, 1961) has application to cases which were tried, and affirmed on appeal, in state courts, prior to June 19, 1961?

II. Whether the search of the hotel room premises of the Respondent, by police officers of Baltimore County was illegal?

III. Whether state court Rules of Procedure, which stipulate that objections to allegedly illegally obtained evidence are waived unless objection was made at the trial, are applicable in the instant case?

STATEMENT OF THE CASE

Leonard Hall, Jr. was tried by a jury in the Circuit Court for Baltimore County, Maryland, for the crime of murder, and was found guilty of murder in the first degree and sentenced to death.

The testimony revealed that on July 16, 1959, Anna Gaff, age 66, was found stabbed to death in a tavern which she and her husband owned and operated. Cigar boxes containing cash, checks and certain keys were discovered to be missing from the premises.

On the day of the crime, while police officers were on the premises conducting an investigation, one of the officers was approached by a man who identified himself as Leonard Hall, Jr. Hall asked certain questions of the police officer,

and advised him that he had been on the premises on tl night previous. The officer took Hall's name and address, which was given to him as the Ritz Hotel in Baltimore City. Later that same day, the officer advised his superior of this conversation, and the superior suggested that it might be a good idea to question Hall. Police officers found Hall in a neighboring tavern. Hall greeted them with the words, "I knew youse were coming." Hall then said to the proprietress of the tavern, "Mary, they think I did it." These words were uttered by Hall before any statement was made to him by the police officers, or before any indication was given by them that he was suspected in the murder — and, in fact, it does not appear that he was actually suspected of this crime until he uttered those words.

Hall was taken by the officers (at approximately 6:25 P.M. on July 16, 1959) to the Essex Police Station for questioning. During the course of the ensuing interrogation, which began at 8:07 P.M., Hall stated that he had recently come from New Jersey and was staying at the Ritz Hotel in Baltimore City. After it was ascertained that there was no such hotel in Baltimore City, Hall voluntarily agreed to accompany the officers in their search for the hotel where he was in fact staying, and for that purpose left the Essex Station with Detectives Shinnamon and Davis at 12:28 A.M., July 17, 1959.

Following Hall's directions, Detectives Shinnamon and Davis drove to the Edison Hotel, which is located near the intersection of Fayette and Gay Streets in Baltimore City. Enroute Hall pointed out to the officers a restaurant and stated that he h. eaten in it on the day of the crime. Hall then advised the officers: "I am not going to show you any more. I've told you enough. I think I ought to see a lawyer." The officers advised him, "That is your privilege.", and they continued on into Baltimore City. Before they

reached the hotel, Hall said, "I would like to see a minister." The officers replied, "Sure." A few minutes later Hall said to the officers, "You fellows have been nice to me. I will show you where the apartment, where the hotel room is." He then advised them, "Make a right turn.", and the officers parked across the street from the hotel. Hall gave the officers the room number and as the members of the Evidence Squad, who had been following in another car, went up to his room, Hall started crying and said, "I am not afraid to die. I am afraid of going to Hell. They are going to find the clothes when they get up to the room." Officer Shinnamon asked, "Are you willing to tell me about it?". He replied, "Yes, if you will take me to a station, I will tell you what happened." The record is not completely clear as to whether or not this was before or after the Evidence Squad had come out of the hotel and had advised the officers accompanying Hall that they had found some evidence in the room.

The police officers who searched Hall's room found therein three cigar boxes containing checks and money which were identified as having been taken from the Gaff tavern. These cigar boxes were shown by the police officers to Hall on the night of his confession, but *not until after he had completed the second of his confessions*, to Mr. C. Leonard Perkins, a court reporter.

These cigar boxes, and their contents, were introduced by the State of Maryland at Hall's trial, without any objection from Hall's counsel — who were retained by him, and not court appointed.

At the trial Hall took the stand solely for the purpose of testifying as to the voluntary nature of his confessions. He did not deny during this testimony the truth of the matters contained in those confessions, but dwelt only on

certain threats or inducements purportedly made to him by the police officers.

Hall appealed his conviction to the Court of Appeals of Maryland, and again he did not raise, before that court, any objection to the introduction into the evidence of the fruits of the search of his hotel room. The Maryland Court of Appeals affirmed Hall's conviction, *Hall v. State*, 223 Md. 158, 162 A. 2d 751.

Hall thereafter sought collateral relief under the Uniform Post Conviction Procedure Act, at which time counsel was appointed by the court to represent him. A hearing was held by the Honorable John E. Raine, Jr. on October 30, 1960, in the Circuit Court of Baltimore County, and relief was denied by Judge Raine. This denial was upheld by the Court of Appeals of Maryland, *Hall v. Warden*, 224 Md. 662, 168 A. 2d 373. In the post conviction proceeding Hall raised for the first time the allegation that evidence obtained by an illegal search was used both to obtain damaging admissions from him, and as evidence against him at his trial. The Maryland court found that any challenge to the legality of the search, and the use of the fruits thereof, was waived by failure to raise the question either at the trial or on appeal. The court commented that this contention could not properly be raised under the Maryland Post Conviction Procedure Act, because of that waiver. It is noteworthy, we think, that this decision of the Maryland Court of Appeals in denying leave to appeal from the post conviction hearing was filed on March 10, 1961, some three months before this Honorable Court's decision in *Mapp v. Ohio*, *supra*.

Hall then applied to this Court for Certiorari from this denial, and his Petition for Certiorari was denied on October 9, 1961 in *Hall, Jr. v. Warden, Maryland Penitentiary*,

No. 107 Misc., October Term, 1961 — almost four months after the decision in *Mapp*.

On November 29, 1961, Hall filed his Petition for Writ of Habeas Corpus in the United States District Court for the District of Maryland, and that court issued the Writ so that the prisoner might have an opportunity to present his evidence on all issues. These issues, *inter alia*, included the allegation that Hall was deprived of due process of law in that evidence obtained by virtue of an unlawful search and seizure was introduced at his trial, and that the same evidence had been used to induce him to make damaging statements to the police.

At the hearing, Hall declined to present any testimony, and elected to submit the case to the District Court on the transcript of the trial in the state court (as prepared for the appeal to the Court of Appeals of Maryland from the original conviction and sentence). The State of Maryland also submitted the case on the record, and counsel for Hall and for the State of Maryland were given the greatest latitude in arguing the point of law presented, which argument consumed almost three hours.

The District Court, after carefully reviewing the transcripts and the decisions of the Maryland state court, determined that Hall's constitutional rights had not been violated and denied relief. *Hall v. Warden*, 201 F. Supp. 639 (Jan. 23, 1962). Judge Thomsen, however, granted a certificate of probable cause on January 31, 1962 and the United States Court of Appeals for the Fourth Circuit, sitting in banc, heard argument on June 7, 1962.

On January 17, 1963, that court in a three to two decision (Judges Haynsworth and Bryan, dissenting) reversed the decision of the District Court and remanded the

case to the United States District Court for the District of Maryland so that that court could afford the State of Maryland a reasonable opportunity to retry the prisoner. In default of such a retrial, the District Court was directed to order Hall's release. In its opinion, the Court of Appeals concluded that Hall's constitutional rights had been violated in that (a) the search of his premises had been illegal (b) introduction of such evidence in a state court proceeding was in violation of Hall's constitutional rights under the Fourth Amendment, as the decision of the Supreme Court in *Mapp v. Ohio* was retroactive and (c) that Hall had not waived his constitutional rights, by failing to object to that evidence at his trial.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals in the instant case is directly in conflict with the decision of the Tenth Circuit Court of Appeals in the case of *Gaitan v. United States*, 295 F. 2d 277 (Apx. B, infra, page 30). The facts of the *Gaitan* case, briefly stated, are that in 1957 Joseph and Delores Gaitan, husband and wife, were sentenced to imprisonment in Federal Court for violation of the narcotics laws. Prior to their trial, on a motion to suppress evidence, the District Court found that a search and seizure had been made and effected by State and local officers without a search warrant or other legal authority, but without participation on the part of federal officers. The motion to suppress was denied and the narcotics obtained by the search were introduced in the evidence. The judgments were affirmed, 252 F. 2d 256; and Certiorari was denied 356 U.S. 937, 78 S. Ct. 779, 2 L. Ed. 2d 812. In October, 1960, petitioners filed a motion under 28 U.S.C. Section 2255 to vacate and set aside the judgments and sentences on the ground that the admission of such evidence constituted a

violation of their constitutional rights. That motion was denied, 189 F. Supp. 574, and the case was appealed to the United States Court of Appeals for the Tenth Circuit. That court affirmed the action of the District Court in denying the motion. Circuit Judge Bratton, speaking for a unanimous court, discussed the effect of *Elkins v. United States*, 364 U.S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669, and *Mapp v. Ohio, supra*. The opinion said, in pertinent part:

> "* * * The evidence was admitted and the judgments and sentences became final. Upon becoming final, they fell within the range of the doctrine of res judicata as between the petitioners and the United States in respect to the evidence being admissible or inadmissible, depending upon the circumstances under which it was obtained. *And a change thereafter in the rule relating to the admissibility of evidence obtained in that manner did not arrest or suspend application of the principle of res judicata to such judgments and sentences.* Warring v. Colpoys, 74 App. D.C. 303, 122 F. 2d 642, 136 A.L.R. 1025, certiorari denied, 314 U.S. 678, 62 S. Ct. 184, 86 L. Ed. 543." (Emphasis supplied.)

The *Gaitan* case was cited by the District Judge in the instant case and relied upon by him in reaching his determination that *Mapp v. Ohio, supra* was not intended to require that a new trial or release must be granted to a person convicted in a state court where the judgment had become final before the decision of this Honorable Court in the *Mapp* case.

The *Gaitan* case was also cited by the Petitioner herein in his brief to the Court of Appeals, and was discussed by Petitioner's counsel in oral argument below. In its thirty-one page opinion below, however, the Circuit Court did not mention or discuss *Gaitan*, nor make any attempt to differentiate between the holding of the Tenth Circuit regarding the retroactive nature of *Mapp* and its own holding.

Your Petitioner submits that this direct conflict between the decision of the Fourth Circuit Court of Appeals in the instant case, and that of the Tenth Circuit Court of Appeals in the *Gaitan* case, is in itself sufficient and compelling reason for this Court to grant Certiorari.

2. The decision of the Court of Appeals is also believed to be erroneous in that the majority of that court concluded that the search of the hotel room premises of the Respondent Hall, by police officers of Baltimore County, was illegal.*

In *Zap v. United States*, 328 U.S. 624, 90 L. Ed. 1477, 66 S. Ct. 1277, Mr. Justice Douglas, in delivering the opinion of the Court, pointed out that the law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments. Citing *Davis v. United States*, 328 U.S. 582, 90 L. Ed. 1453, 66 S. Ct. 1256, Justice Douglas said, at page 628:

"But those rights may be waived."

And, in *United States v. Rabinowitz*, 339 U.S. 56, 94 L. Ed. 653, 70 S. Ct. 430, Mr. Justice Minton, speaking for the majority of a divided Court commented, at page 63:

> "What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches

* The Court of Appeals (Apx. 13), indicates that under *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 64 L. Ed. 319, 40 S. Ct. 182, the confession of Hall must fail, if it is shown at a re-trial that his confession was a direct or indirect result of evidence obtained by an illegal search. Your Petitioner is not aware of any decision of the Supreme Court of the United States which makes the doctrine of *Wong Sun v. United States*, 9 L. Ed. 2d 441, applicable to criminal prosecutions in state courts.

must find resolution in the facts and circumstances of each case. Go-Bart Importing Co. v. United States, 282 U.S. 344, 357, 75 L. Ed. 374, 382, 51 S. Ct. 153. Reasonableness is in the first instance for the District Court to determine."

In the instant case, there was no testimony offered to the District Court concerning the circumstances of the search. Hall did not testify at the District Court hearing, but submitted on the record of the proceedings at the original state court trial. The District Judge carefully considered all of the testimony in the record concerning the search, which testimony is undisputed. The District Judge concluded that Hall had voluntarily approached the officers at the scene of the crime during the afternoon following its commission, and voluntarily gave his address, although erroneously. After his arrest, Hall volunteered to show the police where the hotel was located, and was taken into Baltimore City for that purpose. When they came to the hotel, the District Judge noted, Hall gave the officers the number of his room, and after the Evidence Squad had gone in he said that they would find the clothes (worn by him in the robbery-murder) in the room. The District Judge having considered all of the evidence stated:

"Upon consideration of all the evidence in the record, I conclude (1) that Hall has not shown that the search was illegal, and (2) that no strong reasons or special circumstances exist in this case to prevent the application of the general rules stated in Whitley v. Steiner, 293 F. 2d 895 that Hall has forfeited his right to challenge the search."

79 C.J.S. Searches and Seizures, Section 62, page 818 says that the consent on which the waiver of the constitutional immunity against unreasonable searches and seizures is predicated may be given by actions alone, or action supplementing statements indicating consent. Petitioner be-

lieves it obvious from the undisputed portions of the testimony, on which the District Court relied, that Hall in originally approaching the police officers, in advising the police officers that he was staying in a hotel in Baltimore, in agreeing to show the police officers the location of that hotel, and in supplying them with the number of his hotel room when they arrived at the hotel, clearly waived any objections to the search, and in fact, consented thereto.

We believe that the finding of the Court of Appeals, under all of these circumstances, is clearly erroneous, both as to law and as to fact and that such a finding therefor constitutes proper grounds on which this Court should grant Certiorari.

3. Petitioner also believes that the decision of the Court of Appeals is erroneous in that the court considered, but did not apply, the principle enunciated in Footnote 9 to the majority opinion in *Mapp* (367 U.S. 659). Mr. Justice Clark in delivering the opinion of the Court specifically states, in Footnote 9, that:

> "As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected."

The procedural requirements concerning objections to evidence are clearly set out in the Maryland Rules of Procedure, 1961 Edition. Rule 522d2 states:

> "Every objection to the admissibility of evidence shall be made at the time when such evidence is offered, or as soon thereafter as the objection to its admissibility shall have become apparent, otherwise the objection shall be treated as waived."

And Rule 385 of the Maryland Rules of Procedure provides, in pertinent part:

> "This court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court; * * *"

In a long line of cases, the Court of Appeals of Maryland has consistently held, under the above cited rules, that objections not made at the trial cannot be pursued on appeal. In *Banks v. State*, 228 Md. 130, 179 A. 2d 126 (1962) the Maryland Court said, at page 132:

> "Appellant says that under the recent case of Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. 2d 1081, the narcotics and narcotics paraphernalia found in the house were illegally seized and inadmissible as evidence. It would appear that the entry of the police and their search were permissive or at the least, unobjected to, but — assuming the contrary — the record makes it crystal clear that no point was made at the trial that Banks' arrest or the searches and seizures were illegal, and no objection was taken to the introduction into evidence of the articles seized on the ground of illegal arrest or unwarranted or unconstitutional seizure. * * * 'The cases are legion holding that during a trial counsel may waive review by failure to object to evidence.'"

Nor can they, once waived, be pursued in a Post Conviction Proceeding. *Hall v. Warden*, 224 Md. 662, 168 A. 2d 373.

The Maryland rules concerning objections to the evidence and concerning review on appeal were obviously established long before the decision of this Honorable Court in *Mapp*. We find, however, nothing in *Mapp*, after careful review, which infringes on the operation of those rules and, as noted above, we believe Footnote 9 to the *Mapp* opinion fully contemplates the application by the states of rules similar to the Maryland rules.

In *Whitley v. Steiner*, 293 F. 2d 895, the Court of Appeals for the Fourth Circuit, after a re-examination of all relevant Supreme Court cases, discussed the doctrine of waiver, or forfeiture, of constitutional claims. The court said "* * * where a state prisoner, asserting a denial of constitutional rights in connection with his conviction, has a remedy in the state court but fails to avail himself of it, and later finds himself without a state remedy, he may not have redress through federal habeas corpus. * * * Under such circumstances the petitioner has, to utilize what is probably most appropriate legal doctrine, 'forfeited' his constitutional claim." In that same case, the Fourth Circuit recognized a number of exceptions to the stated general rule, and it is one of those exceptions that the Court of Appeals has applied to the Respondent Hall: "where the petitioner can present other strong reasons justifying his failure; or finally, where there exist particular circumstances which are deemed to justify federal action."

Petitioner believes that the general rule in *Whitley v. Steiner, supra* is properly stated, but we believe that the Court of Appeals erred in holding that Hall came within the exception to that rule, as we do not believe that there exist strong reasons justifying Hall's failure to object at his trial. Whatever the reasons that may be advanced for the failure of Hall to object, the short answer is that Mrs. Mapp did object, and persisted in that objection, to the end that her conviction was vitiated, -- and Hall could have similarly objected and pursued his objections.

It is Petitioner's view that the purpose and intent of Footnote 9 in the *Mapp* decision was that state court prisoners would be required to follow the procedures established for registering objections, and that in the absence of compliance with the state court rules, waiver applies. Petitioner believes that the Court of Appeals, be

failing to follow the guidelines of Footnote 9 has come to a conclusion contrary to that intended by this Honorable Court, which, we believe constitutes additional good reasons for the granting of Certiorari.

4. The decision of the Court of Appeals in the instant case is at variance with the overwhelming majority of the decisions of the highest courts of several states. In the interest of brevity we will not, herein, review in detail the holdings of every state which has held *Mapp v. Ohio, supra* not to be retroactive. For the convenience of the Court, however, we set out below the citations to the leading cases wherein a conclusion that *Mapp* is not retroactive has been reached.

New Jersey — *State v. Watson*, 180 A. 2d 206;
New York — *People v. Friola*, 227 N.Y.S. 2d 423;
People v. Loria, 223 N.Y.S. 2d 462;
Alaska — *Goss v. State*, 369 P. 2d 884;
California — *In re Harris*, 366 P. 2d 305 (concurring opinion);
Nebraska — *Erving v. State*, 116 N.W. 2d 7;
Ohio — *Spence v. Sacks*, 183 N.E. 2d 363.

We have found only one state court decision, that of the Supreme Court of Michigan in *People v. Winterheld*, 115 N.W. 2d 80, holding *Mapp* to be retroactive. A close scrutiny of the entire proceedings in *Winterheld*, however, discloses that that decision was brought about because of a peculiar set of circumstances involving both the *Elkins, supra* and *Mapp* decisions. Since the date of *Winterheld*, we find no other case in Michigan in which *Mapp v. Ohio* has been applied retroactively.

We also believe noteworthy the action of the State of California when it adopted the exclusionary rule in 1955, in *People v. Cahan*, 44 Cal. 2d 434, 282 P. 2d 905. Shortly

after *Cahan* was decided, the California Supreme Court in *People v. Kitchens*, 46 Cal. 2d 260, 294 P. 2d 17 held that the exclusionary rule would be given only a limited retroactive effect, and applied it retroactively to those cases which were pending on appeal at the time of the decision in *Cahan* — just as most of the states cited above have applied *Mapp*.

We also call to the attention of this Court the decision of the United States District Court for the Southern District of New York in the case of *People v. Fay*, 207 F. Supp. 595. In that case the District Court considered a habeas corpus application from a state prisoner. The prisoner's original conviction had been finally affirmed by the Court of Appeals of New York on June 5, 1961 — fourteen days prior to *Mapp*. The petitioner had then sought reargument of his application to appeal to the Court of Appeals, basing his argument on *Mapp*. The state court denied the application, stating as its reason that the *Mapp* case did not apply to the petitioner, because his case had been completed before the date of the *Mapp* decision. The United States District Court, Cashin, Judge, on August 7, 1962, concurred in the finding of the state court, and denied the writ.

CONCLUSION

The conflict between the decisions of the Fourth and Tenth Circuit Courts of Appeals regarding the retroactive or prospective nature of *Mapp v. Ohio* constitutes a compelling reason why this Honorable Court should grant the writ prayed. As we have noted above, the welter of confusion that exists concerning the recognition to be given to state procedural requirements, under Footnote 9 of the *Mapp* opinion, can only be clarified by this Honorable Court. The overwhelming majority of the highest courts

of the several states have decided the points involved at variance with the decision of the Court of Appeals in the instant case, leaving a cloud of uncertainty in the minds of all as to the full ramifications of *Mapp v. Ohio*, that only this Court can dispel.

For these various reasons this Petition for Writ of Certiorari to review the judgment of the Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

THOMAS B. FINAN,
Attorney General of Maryland,

ROBERT F. SWEENEY,
Assistant Attorney General
of Maryland,
1201 Maryland National
Bank Bldg.,
10 Light Street,
Baltimore 2, Maryland,

Counsel for Petitioner.

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ROBERT F. SWEENEY,
Assistant Attorney General of Maryland,
1201 Maryland National Bank Bldg.,
10 Light Street,
Baltimore 2, Maryland.

Counsel for Petitioner.

The Daily Record Co., Baltimore 3, Md.

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APPENDIX A

OPINION

(Filed January 17, 1963)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8592

LEONARD HALL, JR.,
Appellant,

versus

WARDEN, MARYLAND PENITENTIARY,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.
ROSZEL C. THOMSEN, DISTRICT JUDGE.

(Argued June 7, 1962. Decided January 17, 1963.)

Before SOBELOFF, Chief Judge, and HAYNSWORTH, BOREMAN, BRYAN and J. SPENCER BELL, Circuit Judges, sitting en banc.

William F. Mosner (Court-assigned counsel) for Appellant, and Robert F. Sweeney, Assistant Attorney General of Maryland, (Thomas B. Finan, Attorney General of Maryland, on brief) for Appellee.

BOREMAN, Circuit Judge:

This is an appeal from an order of the District Court denying relief in habeas corpus proceedings to Leonard Hall, Jr., a prisoner of the State of Maryland. Hall was convicted on November 11, 1959, in the Circuit Court for Baltimore County, Maryland, of first degree murder and sentenced to death. On appeal to the Court of Appeals of Maryland, the conviction was affirmed.[1] Relief was then sought under Maryland's Uniform Post Conviction Procedure Act[2] but, after a hearing, relief was denied by the Circuit Court for Baltimore County and leave to appeal was denied by the Court of Appeals of Maryland in an opinion which discussed all the points raised.[3] Application for certiorari was denied by the Supreme Court of the United States.[4]

On November 29, 1961, Hall filed his petition for a writ of habeas corpus in the United States District Court for the District of Maryland and that court issued the writ so that the prisoner "might have an opportunity to present his evidence on all issues." However, at the "hearing," Hall and his counsel declined to present any testimony and

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[1] Hall v. State, 223 Md. 158, 162 A.2d 751 (July 8, 1960).
[2] Ann. Code of Md., 1957 Ed., Art. 27, secs. 645A-645J.
[3] Hall v. Warden, 224 Md. 662, 168 A.2d 373 (March 10, 1961).
[4] Hall v. Warden, 368 U.S. 867 (October 9, 1961).

elected to submit the case on the transcript of the trial in the state court prepared for the appeal, and the transcript of the hearing held under the Post Conviction Procedure Act.* The State also submitted the case on the record. The District Court, after carefully reviewing the transcripts and the decisions of the Maryland State Court, determined that Hall's constitutional rights had not been violated and denied relief.**

Pertinent facts will be recited herein but the full opinions in the cases cited in footnotes 1, 3 and 6 should be read in connection with this opinion.

On July 16, 1959, Anna Gaff, 66 years of age, was found stabbed to death in a tavern which she and her husband owned and operated at Essex in Baltimore County, Maryland. Cigar boxes containing cash, checks and certain keys were discovered to be missing from the premises. On the afternoon of that day while the police were searching at the tavern for clues and evidence, Hall, who had been sitting in the tavern, approached one of the officers and asked if he was working on the case and if there were any fingerprints. Hall stated, "Well, if you got fingerprints you will catch the person who did it." He told the officers that he had been in the tavern the night before, that he knew the Gaffs ("Mom and Pop") well, that he often came into the place and that he had stopped in to pay his respects. In response to the police sergeant's inquiry, Hall gave his name and said that the police could find him at a certain tavern if they wanted to talk to him. He then left. The police sergeant and his lieutenant agreed that it would be well to get Hall in for further questioning and, although he was not at the place he had indicated, they located him at a tavern which had a name quite similar to the name of the tavern where he had said he could be found. As he saw two policemen enter the tavern, Hall said, "I knew youse were coming." He then said to the proprietress, "Mary, they think I did it." These remarks

* Stenographic transcripts of these proceedings were made part of the record in support of the petition.

** Hall v. Warden, 201 F. Supp. 689 (January 23, 1962).

by Hall were made before any statement to him by the police officers or before any indication was given by them that he was a murder suspect. In fact, it does not appear that he was actually under suspicion until he made these statements.

Hall willingly accompanied the officers, at their request, to the Essex police station for investigation and questioning and they arrived there at approximately six thirty in the evening of July 16. Hall stated that he had recently come from New Jersey and was staying at the Ritz Hotel in Baltimore, but the officers ascertained that there was no such hotel in Baltimore and so informed Hall. Other discrepancies developed in his statements, but he made no incriminating admissions. The interrogation continued and shortly after midnight Hall agreed to go with the police and point out the hotel where he was actually staying. Following Hall's directions, two detectives drove him to the Edison Hotel in the City of Baltimore. En route Hall pointed out a restaurant where he had eaten on the day of the crime. He then said to the officers, "I am not going to show you any more. I have told you enough. I think I ought to see a lawyer." One of the officers responded, "That is your privilege," but the subject does not appear to have been further mentioned or pursued. Before they had reached the hotel, however, Hall said to the officers, "I would like to see a minister," to which one replied, "Sure." A few minutes later Hall said, "You fellows have been nice to me. I will show you where the apartment, where the hotel room is." When they arrived at the hotel the "evidence squad," which had been following in another car, went to the room, located and numbered as indicated by Hall, and searched it while Hall remained with the officers in the patrol car on the street below. While awaiting the result of the search Hall covered his face with his hands, started crying and said, "I am not afraid to die; I am afraid of going to Hell. They are going to find the clothes when they get up in the room." Hall was then asked if he was willing to tell the officers about it and he agreed, stating that if they would take him to a station he would tell them just what happened. The searching officers had found, under a chair

in Hall's room, the cigar boxes containing money, checks and keys missing from the Gaff tavern. Hall was then taken to the Parkville Station and on the way he said, "I don't know why I did it. I don't know. I just don't know."

Beginning shortly before two o'clock on the morning of July 17, 1959, he was interrogated by Captain Adams of the Baltimore County Police, who had discussed the case with two of the detectives, and Hall made a long oral statement in which he admitted robbing the tavern, carrying a loaded gun, and binding and gagging Mrs. Gaff. He said that after taking the money he went to the bar, drank four or five shots of whiskey, noticed that Mrs. Gaff had gotten the gag loose and that she was "hollering" for help. In fact, he told in detail how he had entered the premises and what he had done up to the time of Mrs. Gaff's outcry. Hall said that he was not sure what happened then. "I must have killed her but I don't know." Detective Davis made longhand notes as Hall gave his statement and this questioning continued until approximately half past two o'clock. About an hour later a court reporter was brought in and Hall made a second statement. The interrogation was concluded at approximately 4:15 o'clock in the morning. During the periods of interrogation, Hall was provided with cigarettes, coca cola, coffee and perhaps doughnuts. The following morning Hall conferred with an attorney employed by his father.

Following his indictment, Hall's jury trial began on November 9, 1959, during the course of which he took the stand for the purpose of testifying, out of the presence of the jury, concerning the voluntary nature of his confessions. His testimony at this point did not convince the trial court that the confessions and admissions were obtained from him by threats, promises or inducements and the oral confessions were permitted, over defense counsel's strenuous objection, to go to the jury. After the prosecution had rested its case defense attorneys, who services were provided by members of Hall's family, called several witnesses to testify. Late in the evening, Hall was called to the witness stand but before he could begin his testimony court

was adjourned until the next day. On the following morning, instead of recalling Hall as a witness in his own defense, his attorneys reconsidered the advisability of permitting him to testify and rested the case. Hall contends that this decision was arbitrarily made by his counsel, without his consent or acquiescence and contrary to his instructions.

We turn to the petitioner's brief for his statement of the questions which are submitted for our consideration on this appeal. They are as follows:

> "1. Was the decision of the trial attorneys, that Hall should not testify in his own behalf, made without his consent or acquiescence?
>
> "(a) If so, did Hall receive a constitutionally fair trial when, against his will, he was deprived of the right to testify in his own behalf?
>
> "2. Was the confession voluntary?
>
> "3. Did the State introduce evidence at the trial in 1959 which was the product of an illegal search?
>
> "(a) If so, is the Doctrine of *Mapp v. Ohio*[7] retroactive to vitiate the conviction on constitutional grounds?"

1.

ALLEGED DENIAL BY HALL'S COUNSEL OF OPPORTUNITY TO TESTIFY

We first note particularly that no oral testimony to support the allegations of the petition was offered before the District Judge although full opportunity to make such presentation was given. At the so-called hearing Hall and his counsel presented to the District Court nothing but a cold record consisting of typewritten transcripts of testimony and proceedings in courts of the State of Maryland. The District Court found, from this material so submit-

[7] 367 U.S. 643 (decided June 19, 1961).

ted, that "Hall acquiesced reluctantly in the decision of his counsel" that Hall should not testify at his trial in his own behalf.

We have examined the records and transcripts which were available to the District Court and which are a part of the record on appeal. It appears that, following his indictment, Hall was represented by two attorneys and he conferred with them on numerous occasions before commencement of his trial. He had frankly admitted to his counsel that he had entered and robbed the Gaff tavern on the night of the murder and that he bound and gagged Mrs. Gaff. He told them, in substance, the same story which he had given to the police officers. However, at all times during the conferences with counsel, he denied that he had stabbed Mrs. Gaff and insisted that she was alive when he left the tavern. Hall's counsel had discussed with him his manner of testifying so that his story might be presented in the most convincing manner, and it had been understood that he would testify in his own behalf. In fact, he was actually called to the witness stand but court was adjourned for the night before he had the opportunity to testify. The following morning, Mr. Sutton, one of Hall's two attorneys, went to the detention room some 25 or 30 minutes before the trial proceedings were to be resumed and again discussed with Hall the manner in which he should testify in his own defense. While they were thus conferring Hall's other attorney, Mr. Daugherty, joined them and stated, in effect, that he had been thinking about this matter and had concluded that the introduction of the statements and confessions into evidence was error and that without them the State had failed to prove its case. After discussion with Hall and in his presence, both attorneys agreed that it would be a mistake to permit Hall to testify and tell the same story which they had concluded was then erroneously before the jury through the introduction of the confessions. Hall was aware of their decision and their reasons therefor.

At the Post Conviction Procedure hearing, Hall testified that he was "under the opinion," up to the time they re-

turned to the court room, that he would be permitted to testify in his own defense.[8]

At the same hearing attorney Sutton was called as a witness. He told of his several conferences with Hall including the last conference held shortly before the trial was to resume.[9]

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[8] The following questions and answers are from the transcript of Hall's testimony.

"Q. And what did Mr. Daughterty say when he came in?

"A. He came in, he says, you're not going to testify, so I asked him why, because it was all agreed that I was going to testify and he told me, he says, well, he says, I just don't think it will do you any good; the prosecutor might, in some way, trip you up and I told him, I asked him, I said, well, he can't trip me up, I says, if I tell nothing but the truth. He says, well, I don't think you should testify, and so the last word that was spoken before they left was, I said, well, I said, you guys are attorneys. I said, I don't know the law, I said, but I want to tell my side of the story and they went out.

"Q. Now, when they went out, did you understand that you were not going to take the stand and testify in your own defense?

"A. No, I didn't. It was — I couldn't understand whether I was or wasn't. I was still under the opinion myself that I was going to testify as we had planned.

[9] The following is taken from the transcript of Mr. Sutton's testimony:

"A. * * * Now about that time Bob [Daugherty] came in. Now, whether or not he had discussed it or not, prior to this, I don't know, but when he came in, he says 'Bill, I've decided not to put him on the stand, what do you think about it?'

(The Court:) "* * * All right, what did you tell him?

"A. Well, we — I don't remember the particular words, I just remember that then we discussed it back and forth as to the — what possible harm may occur as a result of his testimony, so we felt at that point of the trial that it was primarily circumstantial if we were successful in getting across the manner in which he obtained the — they obtained the statement, so we thought at that point they had failed to prove their case and we felt that perhaps it was the best for him not to testify.

"Q. All right, now, what was Mr. Hall's reaction to this when you let him know that he was not going to testify?

"A. When we discussed it with Mr. Hall, he still stated that he wanted to take the stand and I think we finally left it up — it was my impression that we left it up to his decision. Now, it

It is well settled that where the allegations of a petition for a writ of habeas corpus are denied, the burden is upon the petitioner to prove his allegations by a preponderance of the evidence. The District Judge found, in effect, that Hall had failed to carry the burden of proving that he was prevented from testifying by his own counsel, contrary to his stated wishes and explicit instructions. As hereinbefore stated, the District Court found that Hall had reluctantly acquiesced in his counsel's decision.

Complaint is made before us that the District Court relied upon the conclusion of the State Court Judge, who heard and observed Hall and one of his attorneys as they testified, that Hall "merely yielded to the request of his attorneys and their advice that he stay off the stand." It is contended that there is no conflict whatsoever between the testimony of Hall and his attorney witness but it might be reasonably concluded from the record of Hall's testimony alone that the purport of his testimony was: "My attorneys explained to me at my request, the reasons for their decision that I should not testify; I wanted to tell my side of the story but they, being lawyers, should ultimately decide the matter because they knew the law and I didn't; when we all left the detention room I didn't understand fully whether they had decided I was to testify or not but I was still under the *opinion myself* that I was going to testify as we had planned."

The testimony of Hall's attorney was quite vague, uncertain and less than convincing. He was able to recall that Hall had insisted during their several conferences that he

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was just a few minutes and we rushed out to -- court had convened and I can't recall to this minute whether or not he agreed or disagreed.

* * * * * *

"Q. And it is your testimony, as I understand it, then Mr. Sutton, that after the discussion between you and Mr. Daugherty, that you can't say definitely whether Mr. Hall did or did not indicate his consent that he would not take the stand to testify, but you do know that he repeatedly said at this time that he wanted to tell his story to the jury?

"A. That is true."

(Hall) should testify. He stated that he thought the decision was left to Hall but he could not recall the last words spoken by Hall before they returned to the court room and he could not *remember* what decision Hall had reached. Strange it is, indeed, that upon entering the court room immediately following their conference and without hesitation counsel announced in open court, in Hall's presence, that they rested the case for the defense.

It has long been a well-recognized and accepted principle that the appraisal of the value and weight of the testimony of a witness is to be based not only upon consideration of his spoken word but also upon observation of his manner of testifying, his demeanor on the witness stand, his gestures, his inflections, his frankness or evasiveness, his intelligence and the reasonableness of his statements. Finders of fact, juries and judges, see and hear witnesses and apply, interalia, the same principles. The District Judge welcomed an opportunity to hear and observe the witnesses and granted a hearing for that purpose. Instead, he was referred to pages of testimony and was restricted to a consideration of typewritten words. It is small wonder then that he attached significance to the finding of the State Court Judge who had heard and observed the witnesses as they testified before him and who determined that Hall had acquiesced in the decision of his counsel. We cannot say that the District Court's finding that Hall reluctantly acquiesced in his counsel's decision should be set aside as "clearly erroneous."[10] Having made that finding, the District Judge did not, nor do we, reach Hall's further contention that his constitutional rights were violated by his counsel's alleged arbitrary and unauthorized action.

2.

WAS THE CONFESSION VOLUNTARY?

Perhaps this question might be amplified and stated as follows: Were Hall's confessions, damaging statements and admissions voluntary?

[10] See Rule 52(a), Federal Rules of Civil Procedure.

The trial judges and the jury found the confessions, statements and admissions to have been voluntarily made. The Court of Appeals of Maryland, after considering and discussing the claims that the confessions were involuntary and were improperly admitted in evidence, concluded: "We find no basis for overturning the ruling of the trial court in admitting the confessions in evidence or for concluding that the jury could not have properly found that they were made voluntarily and were obtained without the use of force or violence, threats or coercion (physical or mental) and without holding out or offering any inducements or promises therefor." 223 Md. 158, 172.

At the hearing under the Post Conviction Procedure Act, Hall was contending that he had been held incommunicado, had been denied counsel, had been denied access to a minister, and that evidence obtained by an unlawful search was used by the police in their effort to obtain the coerced or involuntary confession. The judge before whom that hearing was held referred to the fact that the issue as to the voluntariness of the admissions and confessions had been determined adversely to Hall by the Maryland Court of Appeals and stated: "Having considered all the circumstances of this case, it is held that there is no showing of a violation of due process."

The District Court, under the heading "*Voluntariness of the Confession*," reported in 201 F. Supp. 639, 645-46, undertook to make its own independent determination of the question. After discussing the pertinent evidence, that court concluded:

> "No material seized in the hotel room was used to obtain the confession from him, although Hall must have realized what the police probably had found in his room. Only after he had made his first admissions, and after his confession had been taken down in question and answer form by a stenographer, was he asked to identify the clothes, cash and checks which were seized at the hotel.
>
> "After considering all of the points and arguments made by counsel for petitioner, I conclude that the

oral confession and other admissions were voluntarily made and that their admission in evidence did not deny petitioner any constitutional right."

The evidence concerning the time when disclosure was made to Hall, or in his presence, of articles found in the hotel room is far from clear. One police officer, who was waiting in the car with Hall while the search was being conducted, testified:

"Q. Then what is the next thing that happened?

"A. After that we were informed by the Evidence Squad that certain evidence had been found in the room rented by Mr. Hall at the new Edison Hotel. At that time Leonard Hall stated, 'If you will take me to a Station, I will tell you all about it.' We informed our radio headquarters, Sergeant Rush was on the radio at the time, to have car 6 occupied by Captain Adams to meet us at the Parkville Station."

This testimony might well support the inference that Hall made his offer to tell all after the report was made in his presence as to the articles found in his room.

The district judge found that Hall was not shown or asked to identify the articles discovered in his room until after he had made his statement at the police station. But, as shown, Hall made other damaging statements while the search was being conducted and on the return trip to the police station which were received in evidence.

We reach the ultimate conclusion, as hereinafter stated, that the State of Maryland must be accorded an opportunity to retry Hall because of the admission in evidence of the articles found as the result of an unlawful search of Hall's hotel room. We can do no more than speculate as to what testimony will be offered at a retrial as bearing upon the voluntariness of the incriminating statements, admissions and confessions. We may assume that the evidence will follow the same general pattern as in the first trial, but we may assume further that the testimony concerning the circumstances of the disclosure to Hall of the

results of the search will be more specific. Thus, we do not affirmatively find that error was committed but we shall call attention to certain principles which should serve as a guide upon a retrial.

It seems clear from the present record that before the commencement of the search Hall made no damaging statements or admissions, that during the course of the search he began to waver and that after the search was concluded he revealed to the police his activities at the tavern on the night of the murder. In determining whether incriminating statements, confessions and admissions are voluntary, the circumstances of pressure must be weighed against the power of resistance of the person confessing. This is true also upon appellate review where the *undisputed* portions of the record will be examined to ascertain the facts against which a claim of coercion must be measured. See *Thomas v. Arizona*, 356 U.S. 390, 393 (1958). In *Takahashi v. United States*, 143 F.2d 118, 122 (9th Cir. 1944), it is stated as follows:

> "But, if it be established that there was an unlawful seizure of these documents, all declarations and statements under the compulsion of the things so seized, are affected by the vice of primary illegality. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391. * * *"

In *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), the Court held, in effect, that not only are the physical objects unlawfully seized inadmissible but no advantage shall accrue to the Government from the search. At a retrial, the trial court and the jury should make the further inquiry and determination whether the unlawful search, even before it had been concluded or the results thereof made known to Hall, affected Hall's power of resistance. It may be that Hall's incriminating statements were induced by the search which Hall must have realized the police were determined to make without bothering to ask his permission and which he must have known, as the District Court stated, would disclose damaging evidence. The psychological effect on Hall produced by this search,

which we later hold to be illegal, is a factor to be considered. See *Nueslein v. District of Columbia*, 115 F. 2d 690, 694-95 (D.C. Cir. 1940), opinion by Associate Justice Vinson, later Chief Justice of the Supreme Court of the United States; *In re Oryell*, 28 F. 2d 639 (D.C. W.D. N.Y. 1928), and *United States v. Setearo*, 37 F. 2d 134 (D.C. Conn. 1930).

3.

DID THE STATE INTRODUCE EVIDENCE AT THE TRIAL IN 1959 WHICH WAS THE PRODUCT OF AN ILLEGAL SEARCH?

(a) If so, is the doctrine of Mapp v. Ohio retroactive to vitiate the conviction on constitutional grounds?

Admitted in evidence at the trial without objection were the articles found by the police officers in their search without a warrant of Hall's hotel room. As stated by the District Court, at the time of Hall's trial and at the time his conviction was affirmed on appeal, the Maryland law sanctioned the admission in evidence in *felony* cases of material seized by state officers in an unlawful search, but prohibited its admission in most misdemeanor cases.[1] In this court Hall agrees, as stated in his brief, that "Maryland law at the time of the trial permitted the introduction of evidence in felony cases no matter how illegal was the search."

For many years the courts of the United States have concerned themselves with the protection afforded by the Fourth Amendment to the Constitution of the United States against unreasonable searches and seizures and against the use, for prosecution purposes, of evidence found and seized during such searches. In considering Hall's contention that his constitutional rights were violated, we turn to certain pertinent court decisions and, in doing so, it is to be kept in mind that Hall is a prisoner of the State of Maryland who stands convicted under the laws of that State of a crime against the State.

[1] 201 F. Supp. 639, 642 (1962).

In *Weeks v. United States*, 232 U.S. 383, (1914), it was held that in a *federal* prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure by federal officers although it was further held that articles unlawfully seized by local police officers acting on their own account were admissible in evidence.[12] This holding in *Weeks* was the first such decision by the Supreme Court of the United States.[13] Since the *Weeks* decision the Supreme Court has required of federal law officers "a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required * * * deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to 'a form of words.'"[14]

In 1949, thirty-five years after *Weeks*, the Supreme Court decided *Wolf v. Colorado*, 338 U.S. 25, which involved a prosecution in a *state* court for a *state* crime. Evidence had been admitted at the trial which was obtained by state officers under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States. The Supreme Court discussed the effect of the Fourth Amendment upon the states through the operation of the Due Process Clause of the Fourteenth Amendment, stoutly adhered to and reaffirmed the *Weeks* decision and determined that the *Weeks* exclusionary rule would not be imposed upon the states as an essential ingredient of the right to the security of one's privacy against arbitrary intrusion by the police. At 338 U.S. 25, 31, the Court stated: "Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective." Although interpreting the *Fourth* Amendment

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[12] See Mr. Justice Stewart's interpretation of Weeks in Elkins v. United States, 364 U.S. 206, 210 (1960).

[13] See Wolf v. Colorado, 338 U.S. 25, 28 (1949).

[14] See Mapp v. Ohio, 367 U.S. 643, 648 (1961).

as forbidding the admission of such evidence, the Court flatly stated: "We hold, therefore, that in a prosecution in a State court for a State crime the *Fourteenth* Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." (Emphasis supplied.) 338 U.S. 25, 33.

And so the law remained following *Wolf v. Colorado* (1949), supra, until the case of *Mapp v. Ohio*, 367 U.S. 643, was decided on June 19, 1961. The Court there held that the exclusionary doctrine of *Weeks* was applicable in state as well as federal prosecutions.

In the period intervening between the *Wolf* and *Mapp* decisions, the Supreme Court had occasions to reconsider the holding in *Wolf*. In *Irvine v. California*, 347 U.S. 128 (1954), Mr. Justice Jackson announced the judgment of the Court[15] and said at page 134:

> "* * * Never until June of 1949 did this Court hold the basic search-and-seizure prohibition in any way applicable to the states under the Fourteenth Amendment. At that time, as we pointed out, thirty-one states were not following the federal rule excluding illegally obtained evidence, while sixteen were in agreement with it. Now that the *Wolf* doctrine is known to them, state courts may wish further to reconsider their *evidentiary* rules. But to upset state convictions even before the states have had adequate opportunity to adopt or reject the rule would be an unwarranted use of federal power. The chief burden of administering criminal justice rests upon state courts. To impose upon them the hazard of federal reversal for noncompliance with standards as to which this Court and its members have been so inconstant and inconsistent would not be justified. We adhere to *Wolf* as stating the law of search-and-seizure cases and decline to introduce vague and subjective distinctions." (Emphasis supplied.)

[15] Mr. Justice Jackson was joined in his opinion by the Chief Justice, Mr. Justice Reed and Mr. Justice Minton.

In *Mapp v. Ohio*, 367 U.S. 643, Mr. Justice Clark, writing for the Court, noted the fact that at "Term after Term" the plea had been made that the Court overturn its doctrine on applicability of the *Weeks* exclusionary rule in state prosecutions (page 654) and directed attention to certain decisions in which *Wolf* was discussed. However, the *Wolf* doctrine remained undisturbed and controlling until the decision in *Mapp* wherein the Court stated, 367 U.S. 654-55:

> "* * * Today we once again examine *Wolf's constitutional documentation* of the right to privacy free from unreasonable state intrusion, and, after *its* dozen years on our books, are led by *it* to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." (Emphasis supplied.)

In *Mapp*, police of the City of Cleveland, Ohio, without a search warrant, visited the defendant's home and, after being denied admittance, gained entry through the use of force, searched the premises, found and seized obscene materials which were introduced in evidence against the defendant at her State trial which resulted in her conviction. Timely objections to the admission in evidence of the seized materials were made. The State of Ohio took the position that even if the search were made without authority, or otherwise unreasonably, it was not prevented from using the unconstitutionally seized evidence at trial and relied on *Wolf v. Colorado*, supra.

At Hall's trial no objection was made when the articles discovered and seized during the search of his hotel room were offered and admitted in evidence. On this appeal Hall's counsel speculates and suggests that the failure to object to the introduction of this evidence at the trial may be explained as follows: Any objection to the evidence would have been summarily overruled under the Maryland rule

then prevailing and it would be "regarded as poor trial tactics to make continued objections before the jury and be overruled by the judge with an accompanying lecture on basic rules of evidence." Whatever may have been the reason for the failure to object, the fact remains that no question as to the legality of the search was raised by Hall either at his trial or on appeal from his conviction, nor was objection made to the use of the fruits of the search at the trial or on appeal. The legality of the search was challenged for the first time in the postconviction proceeding in the state court but Hall did not testify with respect thereto and submitted the point on the record prepared for the original appeal to the Court of Appeals of Maryland just as he elected to do before the District Court in this proceeding. In this respect the instant case is distinguishable from *Mapp v. Ohio* where timely objections to the use of the illegally obtained evidence were interposed and were vigorously pursued on appeal to the Supreme Court of Ohio and in the Supreme Court of the United States.

In the case at bar, the District Judge noted that the Court of Appeals of Maryland, in the postconviction proceeding, said that the right to challenge the legality of the search and the use of the fruits thereof was *waived* by Hall through his failure to raise the question either at his trial or on appeal and that the Maryland Court was "not expressing or implying any opinion as to the legality of the search and seizure there complained of."[16] However, the District Judge stated that, if it appeared from the record that the search was in fact illegal, he would be loath to hold that Hall had forfeited his constitutional claim and, therefore, the Judge should examine the question of the legality of the search. 201 F. Supp. 639, 644. He stated the following conclusions: Since there was no search warrant and the search was not made incident to Hall's arrest, the search, to have been lawful, must have been made with Hall's consent; ordinarily the burden of proof on the issue

[16] Hall v. Warden, 201 F. Supp. 639, 643 (D.C. Md.); Hall v. Warden, 224 Md. 662, 664.

of consent is on the prosecution; the highest court of Maryland held that Hall waived his right to challenge legality of the search and Hall must show, by demonstrating that the search was illegal, that this ruling violated his constitutional rights; upon a review of the evidence Hall has not shown that the search was illegal; no strong reasons or special circumstances exist here to prevent the application of the general rule stated in *Whitley v. Steiner*[17] that Hall has forfeited his right to challenge the search.

As observed by the District Court[18] the general rule, as stated by this court in *Whitley v. Steiner*, 293 F. 2d 895, 898-899, after a re-examination of all relevant Supreme Court cases, is that "* * * where a state prisoner, asserting a denial of constitutional rights in connection with his conviction, has a remedy in the state court but fails to avail himself of it, and later finds himself without a state remedy, he may not have redress through federal habeas corpus. * * * Under such circumstances the petitioner has, to utilize what is probably the most appropriate legal doctrine, 'forfeited' his constitutional claim." However, in the same case this court, speaking through Chief Judge Sobeloff, recognized a number of exceptions to the stated general rule including, inter alia, "where the petitioner can present other strong reasons justifying his failure; or finally, where there exist particular circumstances which are deemed to justify federal action." 293 F. 2d 895, 899-900. We must, then, first determine whether the search was illegal.

In considering the legality of the search, the District Court correctly stated that, absent Hall's consent, the search was illegal. But there was no finding that Hall gave his consent, either express or implied. The court below found that Hall failed to discharge his obligation to show that the search was illegal and, further, in the absence of special circumstances, Hall had forfeited his right to challenge the search under authority of *Whitley v. Steiner*, supra.

[17] 293 F. 2d 895 (4th Cir. 1961).
[18] 201 F. Supp. 639, 643.

Again we turn to the record and we conclude that the search was, in fact, illegal. A person's hotel room is protected against unreasonable search.[19] It cannot be contended that a search under the conditions present here was made in Hall's presence or incident to Hall's lawful arrest.[20] In fact, Hall was voluntarily accompanying the officers and was then under investigation but he had not been placed under arrest. There is no showing of urgency, or that an immediate search might have been justified by a possibility that anything in Hall's room would disappear. On the contrary, it would have been a simple matter to post a guard at the hotel room door and attempt to obtain a lawful warrant. Merely showing the officers the location of the hotel and telling them the number of his room are not sufficient to support a finding of Hall's consent to the search. It seems clear that his consent was not requested and the police were obviously no more concerned with obtaining consent than they were when, earlier that evening, in Hall's absence and without his knowledge or permission, they had ransacked his automobile. These police officers were fully aware that they were investigating a felony and it must be presumed that they were familiar with Maryland law and knew that any evidence found by them would be admissible no matter how it was obtained. The record would not support a determination that consent to search Hall's room could be implied from his conduct and from his failure to expressly object.

How, then, is the decision in *Mapp v. Ohio*[21] to be interpreted and applied? Is it retrospective in effect or is it prospective only? It was handed down after Maryland's judgment of conviction had become final, the state relying upon the doctrine of *Wolf v. Colorado*, supra, and before that doctrine was repudiated and overruled by *Mapp*.

The Supreme Court, in the majority opinion, did not explicitly state that *Mapp* should apply either retrospec-

[19] United States v. Jeffers, 342 U.S. 48 (1951).
[20] Agnello v. United States, 269 U.S. 20 (1925); Jones v. United States, 357 U.S. 493 (1958).
[21] 367 U.S. 643.

tively or prospectively. The District Court observed in 201 F. Supp. 639 at 643: "Until the Supreme Court itself clarifies the point, it is impossible for any other court or judge to be certain whether and to what extent the Supreme Court intended the decision in *Mapp v. Ohio* to be retrospective." We agree. The District Court concluded that, in view of the frequent use in *Mapp* of such words as "then," "today" and "no longer" and the reasons given for the Supreme Court's previous refusal to impose the *Weeks* exclusionary rule on the states, *Mapp* was not intended to require that a new trial or release must be granted in the instant case where the point was not raised at the trial and the judgment had become final before *Mapp* was decided.

However, Mr. Justice Harlan in a dissenting opinion in *Mapp* (367 U.S. at 676), after observing that during the "last three Terms" the issue of the inadmissibility of illegally state-obtained evidence had appeared on an average of fifteen times per Term in the *in forma pauperis* cases which had been summarily disposed of, said: "This would indicate both that the issue which is now being decided may well have untoward practical ramifications respecting state cases long since disposed of in reliance on *Wolf* * * *." Thus it appears that Mr. Justice Harlan, who was joined by Mr. Justice Frankfurter and Mr. Justice Whittaker in his dissent, considered the *Mapp* decision to be retrospectively operative upon ended state criminal cases. We are not unmindful of footnote 9 to the majority opinion (367 U.S. 659) as follows: "As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected." This footnote serves to remind us that the Court of Appeals of Maryland held that Hall had waived his right to challenge the legality of the search through his failure to follow the state procedural requirement that such challenge must be asserted at the trial or on appeal and this holding is to be considered if *Mapp* should be determined to be retrospectively operative.

It is possible to present arguments either for or against the retrospective application of *Mapp*. For example, it is clear that there was a wide divergence of opinion among the Justices of the Supreme Court who participated in the decision during the periods following *Weeks* and *Wolf* and prior to *Mapp*. But it seems to us that the majority during that period viewed the question of admissibility of evidence obtained as the result of an unreasonable search as one concerned primarily with practical consequences of the application of formulated *rules of evidence* and by considerations of state and federal relations. The Supreme Court declared unconstitutional the use in *federal* prosecutions of evidence illegally obtained by *federal* officers but declined repeatedly to interfere with the states in their adoption of *rules concerning the introduction of evidence in state courts* in criminal prosecutions. Thus it might be said that the states had been led to believe that, prior to *Mapp*, they had definite assurance of federal non-intervention in this area. But the decision in *Mapp* scotched all notion that only *evidentiary rules* were involved. The majority held that this was a constitutional question and had been all along even though not so recognized by a majority of the Court: that the *Fourteenth Amendment* is a bar to the use by the states of evidence illegally obtained. Surely, in the minds of those who had sought to find some semblance of logic in a rule which recognized that, under the Constitution, evidence could be illegally seized and yet used to restrain the liberty or take the life of one whose constitutional guarantees were violated by the original unlawful actions of the State, the decision in *Mapp* was long overdue.

It must be recognized that, since *Weeks* and *Wolf*, there had been no change in the constitutional requirements of due process considered and found controlling in *Mapp*. If the protections are there now, were they not present when *Wolf* was decided and were they not present when Hall was tried, convicted and sentenced? An affirmative answer would appear to be inescapable.

It has been held that where a conviction is not final because of an appeal pending at the time *Mapp* was decided,

the conviction must be reversed and the exclusionary rule of *Mapp* applied at the retrial.[22] There the State argued that past constitutional infringements should be ignored but the Court rejected this reasoning where the appeal was still pending, even though the conduct of the trial was proper under the law as laid down at that time. In *People v. Figueroa*, 30 Law Week 2158, a New York City Court found persuasive indication in the *Mapp* opinion that the Court intended to impose the rule prospectively and not retroactively, just as did the District Court in the instant case.

However, we note that the Supreme Court did not limit *Griffin v. Illinois*, 351 U.S. 12 (1956), to prospective operation although Mr. Justice Frankfurter, concurring in the judgment, urged that the Court should do so (pp. 25-26). In *Eskridge v. Washington Prison Bd.*, 357 U.S. 214, decided in 1958, the Supreme Court applied the rule announced in *Griffin*, supra, to a state conviction obtained in 1935.

It might be argued that a retroactive application of the *Mapp* rule will flood the courts with petitions from prisoners long since tried and convicted by the use of illegally seized evidence. If such is the result of enlightened opinion, so be it. Such fears have not deterred the courts before.[23] It may be cogently argued further that if certain evidence is today inadmissible to convict an accused, so should yesterday's conviction, based on identical evidence, be set aside and a retrial ordered where a person's life is at stake. Hall's conviction was affirmed and finalized before *Mapp*

[22] People v. Loria, 10 N.Y. 2d 368, 223 N.Y.S. 2d 462, 179 N.E. 2d 478. The District Court cited this case and referred also to a Maryland case, Shorey v. State, 227 Md. 385 at 389, 177 A. 2d 245 at 247 (Jan. 23, 1962). In the Shorey case, the Court of Appeals of Maryland said (p. 389): "The majority in the Mapp case seems to recognize * * * that State procedural requirements to raise or preserve the question may still be respected, even where it is claimed that the Fourteenth Amendment is violated by the introduction of illegally obtained evidence in a State prosecution."

[23] See Griffin v. Illinois, 351 U.S. 12 (1956); Herman v. Claudy, 350 U.S. 116 (1956).

and for this technicality in point of time the State argues that the courts should refuse relief to Hall. But is this conviction so impregnable to collateral attack that the law is justified in exacting the death penalty from Hall because his trial and appeal were pushed along while it is possible that others who may have obtained delays may be retried by a different yardstick?

For compelling reasons, a court may expressly declare that its decision shall be prospective only. We do not say that, in the absence of an *express* declaration, the same intent might not be clearly disclosed in the court's opinion. The District Court drew that conclusion from the use by Mr. Justice Clark of certain isolated words in the *Mapp* majority opinion but we are not convinced that the Supreme Court, in forcefully expounding the existing, though unenforced, constitutional protections afforded state prisoners by the Fourteenth Amendment, intended its decision to sanction denial of relief in a case such as this.

The Court, in *Mapp*, commenting on what *should have been* the holding in *Wolf*, stated:

> "* * * Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the *Wolf* case. In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. * * *" 367 U.S. 655, 656.

It is significant that the Supreme Court did not specifically declare that the effect of its decision was to operate only in the future, as it might have done.

The final question to be considered and determined is whether there were special circumstances present in this case to bring it within the exception stated by this court in *Whitley v. Steiner*.[24]

Under Maryland law, objections at the trial to the admission of the evidence obtained as the result of the unlawful search would have been futile in the State court as Hall's counsel well knew. It may now appear to have been the wiser course to object to the introduction of this evidence and to follow the same procedure as in *Mapp v. Ohio*. But we reiterate that the Supreme Court had refused, time after time and over a long period of years, to require of the states the adoption of the *Weeks* exclusionary rule. There was nothing in the history of the decisions to raise or encourage the hope that the Supreme Court might then be inclined to change the rule. In fact, in the *Mapp* case, it appears doubtful that counsel for the accused were relying particularly on this point. Mr. Justice Harlan voiced strenuous objection to the Court's consideration of this constitutional question since, in his opinion, it had not been fully briefed and argued. We conclude that, under these special circumstances, the failure of Hall to object to the admission of the fruits of the illegal search and to raise the question on appeal is not only understandable but excusable. The State of Maryland is hardly in position to insist that this failure constituted a waiver or forfeiture of Hall's constitutional rights. It is incredible that Hall would consciously and willingly have surrendered such a right, which was undoubtedly violated, had he known then what he knows now. In *Mapp*, had the Court sustained the conviction, a modest penalty was involved. Here, a man's life hangs in the balance and, while that fact is not controlling, it is just another circumstance which may be considered along with the other exceptional and special circumstances in the case. Perhaps the District Court may have been somewhat reluctant to be the first to apply *Mapp* retroactively, but it appears now that unless it is so applied

[24] 203 F. 2d 805.

and Hall's case is the first to be decided on that ground, the decision—at least for him—will be the last.

Counsel for Hall does not insist that the granting of proper relief here requires Hall's release from State custody. It is suggested that the case be remanded to the District Court with instructions to afford Hall such relief as, in its discretion, "is consistent with harmonious state-federal relations." We conclude that the District Court should afford the State of Maryland a reasonable opportunity to retry the prisoner. In default of this, the District Court should order his release.[2] To that end, the case will be remanded for further proceedings consistent with the views herein expressed.

Reversed and remanded.

HAYNSWORTH, Circuit Judge, dissenting:

When this Court considers the sufficiency of evidence to support a particular finding of fact, differences within the Court in a particular case need not occasion dissents. When the difference arises repeatedly, however, it becomes appropriate to question whether the prescribed standard of review is being properly applied. If it is not, dissent may serve some useful purpose, though it would be fruitless if there was no more than an isolated difference in judgment as to the reasonableness of a particular inference to be drawn from the record of one case.

In several recent cases, I have recorded my disagreement with reversals upon factual questions when the findings below seemed to me to rest upon substantial evidence.[1] I do so again.

[2] See Hobbs v. Pepersack, 301 F. 2d 875 (4th Cir. 1962).

[1] Mason v. Mathiesen Tanker Industries, Inc., 308 F. 2d 21, 28; Davis v. State of North Carolina (decided Nov. 7, 1962); Gardner, as Admx. v. National Bulk Carriers, Inc., etc., et al. (decided October 26, 1962).

The District Judge found that Hall consented to the search of his room. In his opinion, he clearly stated the legality of the search was dependent upon Hall's consent. After considering evidentiary matters, he concluded that Hall had not shown the search to have been unlawful. He placed the burden of showing an absence of consent upon Hall because Hall, at the trial, had not objected to admission of the evidence seized in the course of the search. He thought, I think correctly, that Maryland's procedural rule that would foreclose subsequent consideration, when no objection was made at the time of trial to the receipt of the evidence, required Hall to show that the search was more than arguably unlawfully. We would adopt a similar approach if a District Judge refused to consider an untimely objection. See Rule 41(e) of the Federal Rules of Criminal Procedure.

If, however, the Court were of the opinion that the burden of persuasion rested upon Maryland to show that Hall consented to the search, a remand for reconsideration of the factual question would be in order; but disregard of the finding would be unwarranted.

The District Court's finding that Hall consented to the search is an ultimate finding which rests upon substantial evidence.

Hall sought out the police. He invited their attention to him and encouraged their suspicion of him. Not under arrest, he went willingly to the police station to talk to them about the events of the night before. He volunteered to take them to his hotel, which he had misidentified. He did so at a time and under such circumstances that he must have known that the officers intended to search the room as soon as they located it, and that they would carry through with their intention when he disclosed the location of the room to them. At least, a reasonable fact-finder might infer from all of the facts and circumstances that Hall from the beginning wanted to bare his breast, wished the incriminating evidence in his room discovered, and willingly took the officers to his room in furtherance of that purpose.

There is no need here to marshal all of the evidence which appears to support the finding. It is sufficiently revealed in the opinion of the District Judge and in the opinion of the majority. It is sufficient in my opinion to warrant the finding that consent was implicit in Hall's conduct. If the District Judge might have found the facts the other way, it is not for us to intrude upon the fact-finder's prerogative to determine which of two permissible, but conflicting, inferences is the more reasonable.

For the reasons stated by Judge Thomsen in his opinion, I would affirm.

ALBERT V. BRYAN, Circuit Judge, dissenting:

With the District Judge I think the confession of the accused was altogether voluntary, free of force or favor. The evidence establishes with equal clarity that he consented to the search of his room. This also in effect was the conclusion of the District Court. The result is that the articles seized in the search were, in my view, admissible in evidence without question upon either State or Federal grounds. In these circumstances *Mapp v. Ohio*, 367 U.S. 643 (1961) obviously is without pertinence, and no resolution need be made of whether or not the decision is retrospective. As reversal is premised on the illegality of the search, I must dissent.

I would affirm on the opinion of the District Court, *Hall v. Warden*, 201 F. Supp. 639 (1962).

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[2] Hall v. Warden, 201 F. Supp. 639.

JUDGMENT

(Filed January 17, 1963)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8592

LEONARD HALL, JR.,

Appellant,

vs.

WARDEN, MARYLAND PENITENTIARY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings consistent with the views expressed in the opinion of the Court filed herein.

HERBERT S. BOREMAN,

United States Circuit Judge.

A true copy, Teste:

RICHARD M. F. WILLIAMS, JR.,

Clerk of the United States Court of Appeals for the Fourth Circuit.

(Seal)

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APPENDIX B

JOSEPH AGUILAR GAITAN AND DOLORES MARIE GAITAN,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 6647

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT.

SEPT. 27, 1961.

Rehearing Denied Oct. 27, 1961.

Walter L. Gerash, Denver, Colo., for appellants.

Lawrence M. Henry, U.S. Atty. for the Dist. of Colorado, Denver, Colo., for appellee.

Before MURRAH, Chief Judge, and BRATTON and BREITENSTEIN, Circuit Judges.

BRATTON, Circuit Judge.

The question presented on this appeal is whether a judgment and sentence imposed in a criminal case in the United States Court was open to attack by motion filed under 28 U.S.C. § 2255, on the ground that evidence seized in the course of an unreasonable search by state and local officers was erroneously admitted over the seasonably made objection of the accused.

The question arises in this manner. Joseph Aguilar Gaitan and Dolores Marie Gaitan, husband and wife, hereinafter referred to as petitioners, and others, were charged by in-

dictment with violations of the narcotics laws. Prior to trial, petitioners filed a motion to suppress as evidence a bag of marihuana found by officers concealed in the dwelling place of petitioners and seized. After hearing evidence, the court found that the search and seizure were made and effected by state and local officers without a search warrant or other legal authority and without participation on the part of federal officers. The motion was denied; the marihuana was introduced in evidence; in 1957, petitioners were sentenced to imprisonment, one for a term of ten years and the other for a term of five years; the judgments were affirmed, 252 F. 2d 256; and certiorari was denied, 356 U.S. 937, 78 S. Ct. 779, 2 L. Ed. 2d 812. In October, 1960, petitioners filed a motion under 28 U.S.C. § 2255 to vacate and set aside the judgments and sentences on the ground that the admission of such evidence constituted a violation of their constitutional rights. The motion was denied, 189 F. Supp. 674; and the cause came here on appeal.

The order denying the motion to vacate and set aside the judgments and sentences is challenged on the ground that the denial of the motion to suppress and the admission of the marihuana in evidence in the trial of the criminal case constituted a denial or infringement of the constitutional rights of petitioners. Of course, the Fourth Amendment to the Constitution of the United States constitutes a sweeping grant of protection against unreasonable searches and seizures. But it does not provide in express language that evidence obtained in the course of an unlawful search and seizure shall be inadmissible in the trial of a criminal case. In *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652, it was held that evidence obtained by federal officers in the course of an illegal search and seizure is not admissible in evidence in a criminal case in the United States Court. That determination did not derive from the explicit requirements of the Amendment. It was based upon judicial implication, and it has been reiterated time and time again. In *Byars v. United States*, 273 U.S. 28, 47 S. Ct. 248, 71 L. Ed. 520, it was held that where an illegal search and seizure is in effect a joint operation of local and federal officers, the evidence obtained must be ex-

cluded in the trial of a criminal case in the United States Court; and that rule was reiterated in *Lustig v. United States*, 338 U.S. 74, 69 S. Ct. 1372, 93 L. Ed. 1819. At the time of the trial and of the imposition of the sentences under review, it was and has been for a long time the settled rule that evidence obtained through a wrongful search and seizure by state or municipal officers, acting independently of the federal government and not solely for the purpose of aiding in the enforcement of federal law, was admissible in a criminal prosecution in a United States Court even though the property seized was by the state or local officers delivered to federal authorities for the purpose of being used as evidence in connection with the prosecution. *Byars v. United States*, supra; *Feldman v. United States*, 322 U.S. 487, 64 S. Ct. 1082, 88 L. Ed. 1408; *Taylor v. Hudspeth*, 10 Cir., 113 F. 2d 825; *Butler v. United States*, 10 Cir., 153 F. 2d 993; *Ruhl v. United States*, 10 Cir., 148 F. 2d 173; *Gilbert v. United States*, 10 Cir., 163 F. 2d 325; *Gallegos v. United States*, 10 Cir., 237 F. 2d 694.

But in *Elkins v. United States*, 364 U.S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669, and *Rios v. United States*, 364 U.S. 253, 80 S. Ct. 1431, 4 L. Ed. 2d 1688, decided in June, 1960, it was held that evidence obtained by state or local officers in the course of an unreasonable search, even without participation by federal officers, and not solely for the purpose of aiding in the enforcement of federal law, must be excluded from evidence in the trial of a criminal case in the United States Court. And in *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, decided in June, 1961, it was held in effect that evidence obtained through means of an illegal search and seizure, whether by state, local, or federal officers, acting separately or in conjunction, is to be excluded in the trial of a criminal case either in the state or federal court. It is thus clear that at the time of the trial of petitioners and at the time of the imposition of the sentences upon them, it was the then presently existing rule that evidence secured by state or local officers in the course of an illegal search and seizure, acting independently of federal officers and not for the purpose of aiding in the enforcement of federal law was admissible in a criminal

prosecution in a United States Court even though the property seized was by the state or local officers delivered to federal authorities for the purpose of being used as evidence in connection with the prosecution; and that the challenged evidence was admitted in full harmony with that rule. The court had jurisdiction of the subject matter of the cause; had jurisdiction of the persons of petitioners; the challenged evidence was then admissible as against the attack there made and here made; the judgments and sentences were not in conflict with the statutory penalty for the offenses for which petitioners had been found guilty; and the judgments became final.

The substance of the familiar doctrine of res judicata as conventionally applied in civil cases is that any right, fact, or matter in issue and directly adjudicated or necessarily involved in the determination of an action before a court of competent jurisdiction in which a judgment or decree has been entered upon the merits is conclusively settled by such judgment and cannot be again litigated between the same parties or their privies, whether the claim, demand, or purpose of the subject matter of the two suits be the same or not. The sweep of the doctrine is that "a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified." *Southern Pacific Railroad Co. v. United States*, 168 U.S. 1, 48, 18 S. Ct. 1827, 42 L. Ed. 355; *United States v. Munsingwear, Inc.*, 340 U.S. 36, 71 S. Ct. 104, 95 L. Ed. 36; *Happy Elevator No. 2 v. Osage Construction Co.*, 10 Cir., 209 F. 2d 459. And the doctrine applies in criminal proceedings with the same conclusive effect as in civil proceedings. *Frank v. Mangum*, 237 U.S. 309, 35 S. Ct. 582, 59 L. Ed. 969; *United States v. Oppenheimer*, 242 U.S. 85, 37 S. Ct. 68, 61 L. Ed. 161; *Sealfon v. United States*, 332 U.S. 575, 68 S. Ct. 237, 92

L. Ed. 180; *Wheatley v. United States*, 10 Cir., 286 F. 2d 519; *Yawn v. United States*, 5 Cir., 244 F. 2d 235.

The question whether the marihuana was admissible in evidence or should be excluded therefrom was put squarely in issue in the criminal case. The question was determined with pinpointed precision. The evidence was admitted and the judgments and sentences became final. Upon becoming final, they fell within the range of the doctrine of res judicata as between the petitioners and the United States in respect to the evidence being admissible or inadmissible, depending upon the circumstances under which it was obtained. And a change thereafter in the rule relating to the admissibility of evidence obtained in that manner did not arrest or suspend application of the principle of res judicata to such judgments and sentences. *Warring v. Colpoys*, 74 App. D.C. 303, 122 F. 2d 642, 136 A.L.R. 1025, certiorari denied, 314 U.S. 678, 62 S. Ct. 184, 86 L. Ed. 543.

The order denying the motion under 28 U.S.C. § 2255 is affirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Civil No. 13450

Filed January 23, 1962

LEONARD HALL, JR.

v.

WARDEN, MARYLAND PENITENTIARY

William F. Mosner, of Towson, Maryland, for petitioner.

Thomas B. Finan, Attorney General of Maryland, Robert F. Sweeney and Thomas W. Jamison, III, Assistant Attorneys General of Baltimore, Maryland, for respondent.

THOMSEN, Chief Judge —

This petition for a writ of habeas corpus was filed by a state prisoner (Hall), who was convicted of first degree murder by a jury in the Circuit Court for Baltimore County, Maryland (Menchine and Lindsay, JJ), and was sentenced to death. The conviction was affirmed on appeal, *Hall v. State* (July 8, 1960), 223 Md. 158, 162 A. 2d 751. Hall's application for relief under the Uniform Post Conviction Procedure Act, Anno. Code of Md., 1957 ed., Art. 27, secs. 645 A-J (the UPCPA), was heard and denied by the Circuit Court for Baltimore County (Raine, J), and leave to appeal was denied by the Court of Appeals of Maryland in an opinion which discussed all of the points raised, namely: "(a) that he was not afforded an adequate opportunity to testify in his own behalf; (b) that he was denied

the right to counsel when questioned by police shortly after his arrest and gave a damaging statement, which was used against him and which could not have been obtained from him if he had then had counsel; and (c) that evidence obtained by an illegal search was used both to obtain damaging admissions from him and as evidence against him at this trial." *Hall v. Warden* (March 10, 1961), 224 Md. 662, 168 A. 2d 373. A petition for a writ of certiorari was denied by the Supreme Court of the United States (October 9, 1961), 368 U. S. 867.

Because of the particular circumstances, that life is at stake, and that neither this court nor any Maryland State court has yet construed *Mapp v. Ohio*, 367 U. S. 643, this court issued a writ of habeas corpus, so that petitioner might have an opportunity to present his evidence on all issues. At the hearing before this court, however, petitioner and his counsel both stated that they wished to submit their case on the transcript of the trial prepared for the appeal and the transcript of the UPCPA hearing. The State also submitted the case on the record. Counsel for petitioner argued (1) that Hall was denied an opportunity to testify at his trial; (2) that the search of Hall's hotel room was illegal and that the use of material seized therein (a) as evidence at his trial, and (b) to procure damaging admissions from him, violated his constitutional rights, and (3) that Hall's confession was not voluntary, because he had been denied the right to counsel by the police and for other reasons.

The facts of the case pertinent to questions (2) and (3) are set out at length in the careful opinion of Chief Judge Brune on the original appeal, 223 Md. at 163 et seq., 162 A. 2d at 754 et seq. They will not be repeated herein, but that opinion should be read in connection with this opinion. The evidence shows the callous murder of a woman, aged 66, committed in connection with the robbery of a tavern operated by the victim and her husband. On the stand, in the UPCPA proceeding, Hall admitted the robbery and admitted tying the woman and leaving her on the floor, but said that she was alive when he left.

(1)

The alleged denial of an adequate opportunity to testify.

At his trial and on appeal from his conviction Hall was represented by two lawyers employed for him by his family. Before the statement which Hall made to the police was admitted in evidence against him, Hall testified out of the presence of the jury concerning the taking of the statement and his treatment from the time the police first picked him up until the statement was made. After the judges decided to admit the statement in evidence, that testimony was read to the jury. After the State had closed its case the defense called six witnesses, who testified, and then called Hall, but he did not have an opportunity to testify before court adjourned. Overnight his counsel reconsidered the desirability of Hall's taking the stand. The essential facts on this phase of the case are summarized in the opinion of the Court of Appeals in the UPCPA proceeding, 224 Md. at 665, 168 A. 2d at 375.

Hall testified before Judge Raine in that proceeding, as did his junior counsel. Judge Raine considered the facts quite fully and delivered a carefully reasoned opinion in which he said, inter alia: "He [Hall] merely yielded to the request or demands of his attorneys and their advice that he stay off the stand and the fact that if he took the stand he was going to admit that he robbed the tavern in question and he tied up the victim may well have persuaded them to use every reasonable effort to keep him off the stand."

The Court of Appeals, on application to review Judge Raine's decision, said: "The question comes down, we think, to whether an alleged error in trial tactics by a defendant's own counsel amounts to a deprivation of due process of law under either the Fourteenth Amendment or the Constitution of this State. We are not prepared to say that the choice here in question was a bad one; but if we assume that it was, and if we further assume that Hall did not intend to acquiesce in it, his own counsel's decision

not to call him as a witness involved no action by the State, and did not, in our opinion, amount to a violation of Hall's constitutional rights, and hence affords no ground for relief under the UPCPA. Even on direct appeal the trial tactics of counsel are not ordinarily reviewable by this Court. *Hardesty v. State*, 223 Md. 559, 563, 165 A. 2d 761; *Madison v. State*, 200 Md. 1, 87 A. 2d 593, and errors in trial tactics do not afford a basis for relief under the UPCPA; * * * The applicant's contention would seem to lead logically to a retrial of every criminal case resulting in a conviction — some because the defendant (as here) did not testify in his own defense, others because he did so testify." 224 Md. at 665-666, 168 A. 2d at 375.

The issue was fully and fairly considered by the State Courts. The question of fact was not free from difficulty, but Judge Raine had the advantage of observing both Hall and his lawyer witness, who is a member of the bar of Judge Raine's court, as is also the lawyer who was senior counsel for Hall at the trial. Petitioner did not take the stand at the hearing before me, although he was given an opportunity to do so; instead, he stated in open court that he wished to submit on the record. Under the evidence so submitted, I find that Hall acquiesced, reluctantly, in the decision of his counsel. The conclusions reached by Judge Raine and by the Court of Appeals of Maryland on this point did not deny Hall any constitutional right.

(2)

The alleged illegal search and use of material obtained thereby as evidence against Hall at his trial and to procure damaging admissions from him.

Petitioner relies primarily on *Mapp v. Ohio*, 367 U.S. 643, decided by the Supreme Court on June 19, 1961. The State contends: (a) that under the law applicable to this case the use of material seized by State officers in an illegal search would not deprive a defendant of any constitutional right, and that *Mapp v. Ohio* does not help this petitioner, whose conviction was affirmed on appeal before that de-

cision; (b) that any challenge to the legality of the search and the use of the fruits thereof was waived by petitioner's failure to raise the question either at his trial or on appeal; and (c) that the search was not illegal, because Hall consented to it.

(a) In *Wolf v. Colorado*, 338 U.S. 25, decided in 1949, the Supreme Court held in effect that the Fourteenth Amendment prohibits unreasonable searches and seizures by state officers, but that the exclusionary rule of *Weeks v. United States*, 232 U.S. 383, would not *then* be imposed upon the states as an essential ingredient of the right. See *Mapp v. Ohio*, *supra*, at p. 650.

At the time of the trial and at the time the conviction was affirmed on appeal, the Maryland law permitted the admission into evidence in *felony* cases of material seized by State officers in an unlawful search, but prohibited its admission in most *misdemeanor* cases. Anno. Code of Md., 1957 ed., Art. 35, sec. 5; *Salsburg v. State*, 201 Md. 212, 94 A. 2d 28, aff'd sub nom; *Salsburg v. Maryland*, 346 U.S. 545; *Barker v. Warden*, 208 Md. 662; *Givner v. State*, 210 Md. 484, 124 A. 2d 764; *Mulcahy v. State*, 221 Md. 413, 158 A. 2d 80.

Term after term the Supreme Court refused to overturn the doctrine of the *Wolf* case until the States had "adequate opportunity to adopt or reject the [Weeks] rule." *Irvine v. California*, 347 U.S. 128, 134; *Mapp v. Ohio*, *supra*, at p. 654. But in *Mapp v. Ohio*, decided in June 1961, the opinion of the Court, delivered by Mr. Justice Clark, said: "* * * we can no longer permit that right to remain an empty promise" and held that "all evidence obtained by searches and seizures in violation of the Constitution is, by the same authority, inadmissible in a state court." 367 U.S. 643, at 655, 660.

Until the Supreme Court itself clarifies the point, it is impossible for any other court or judge to be certain whether and to what extent the Supreme Court intended the decision in *Mapp v. Ohio* to be retrospective. A majority

of the Court of Appeals of New York has concluded that the exclusionary rule stated herein should be applied in a case where the judgment of conviction had not yet become final, because of a pending appeal, at the time *Mapp v. Ohio* was decided. *People v. Loria* (Nov. 30, 1961), N.Y. , N.E. 2d . See also *Shorey v. State* (January 23, 1962), Md. , A. 2d . But it has not yet been held in any case cited or found that all persons convicted in state courts during the period between *Wolf v. Colorado* and *Mapp v. Ohio* are entitled to a new trial or release if any evidence, obtained as the result of an unreasonable search and seizure was admitted at their trial, even though the judgment of conviction may have become final long before *Mapp* was decided and whether or not the point was raised at the trial.

In view of the frequent use in Mr. Justice Clark's opinion of such words as "then", "today", and "no longer", and the reasons given for the Supreme Court's previous refusal to impose the *Weeks* exclusionary rule on the states, such an extreme construction appears unwarranted. I conclude that *Mapp v. Ohio* was not intended to require that a new trial or release must be granted to a person convicted in a state court because evidence obtained as the result of an unlawful search was admitted in evidence at the trial, where the point was not raised at the trial and the judgment had become final before the decision of the Supreme Court in the *Mapp* case. See *Gaitan v. United States*, 10 Cir., 295 F. 2d 277, 279-80. In the case at bar the point was not raised at the trial or on appeal from the conviction, and the judgment had become final before *Mapp v. Ohio*. So, even if the evidence had been illegally seized, its admission would not have deprived petitioner of his constitutional rights.

(b) As we have seen, the legality of the search was not raised by petitioner at his trial nor on appeal from his conviction. It was raised in the UPCPA proceeding, but petitioner did not testify with respect thereto, submitting the point on the record prepared for the original appeal, as he has also elected to do at the hearing in this court. In the UPCPA case the Court of Appeals said: "Any challenge to the legality of the search and the use of the fruits thereof

was waived by failure to raise the question either at the trial or on appeal." The Court added: "We do not express or imply any opinion as to the legality of the search and seizure here complained of." 224 Md. at 664, 168 A. 2d at 374.

The general rule, as stated by the Fourth Circuit in *Whitley v. Steiner*, 293 F. 2d 895, after a re-examination of all relevant Supreme Court cases, is that "* * * where a state prisoner asserting a denial of constitutional rights in connection with his conviction, has a remedy in the state court but fails to avail himself of it, and later finds himself without a state remedy, he may not have redress through federal habeas corpus. * * * Under such circumstances the petitioner has, to utilize what is probably the most appropriate legal doctrine 'forfeited' his constitutional claim." 293 F. 2d at 898, 899. See *Mapp v. Ohio*, 367 U.S. at 659, n. 9.

The Fourth Circuit recognized a number of exceptions to the general rule, none of which apply in this case, unless possibly this is an instance "where the petitioner can present other strong reasons justifying his failure; or finally, where there exist particular circumstances which are deemed to justify federal action." 293 F. 2d at 899, 900.

Petitioner cites the change in the law and the fact that this is a capital case as the reasons and particular circumstances justifying federal action, and relies on *Williams v. Georgia*, 349 U.S. 375. It is true that in *Williams v. Georgia* the Supreme Court said: "That life is at stake is of course another important factor in creating the extraordinary situation." 349 U.S. at p. 391. However, in *Williams v. Georgia* the State had conceded at the argument in the Supreme Court that, as a matter of substantive law, Williams had been deprived of his constitutional rights. 349 U.S. at p. 390. No such concession had been made in the case at bar; the State denies that the search was illegal, and relies on that point as well as on waiver and on the law at the time of conviction and appeal. It should be noted that the Supreme Court did not order

that Williams be released, but remanded the case to the State Supreme Court "for reconsideration". 349 U.S. at p. 391.

A District Court has no power to order such a remand, although a similar result might be accomplished by other means. If it appeared from the record that the search was in fact illegal, this court would be loath to hold that petitioner had forfeited his constitutional claim. The legality of the search should therefore be examined.

(c) There was no search warrant, and the search was not made incident to the arrest. Thus, to have been lawful, it must have been made with the consent of the petitioner.

Ordinarily the burden of proof on the issue of consent is on the prosecution. Here, however, no question of the legality of the search was raised by petitioner either at his trial or on appeal from his conviction, and the highest court of the State has held that he thereby waived the right to challenge the legality of the search and the use of the fruits thereof. Petitioner must show that this ruling violates his constitutional rights; to do that he must show that the search was illegal.

Neither petitioner nor the State offered any testimony on this point in the UPCPA proceeding or in this court; both submitted on the transcript of the trial prepared for the first appeal.

From the testimony of the police officers in that record it appears that Hall voluntarily approached the officers at the scene of the crime during the afternoon following its commission, asked if they had found any fingerprints, and gave his address as the Ritz Hotel in Baltimore. There was no hotel of that name in the city. After his arrest, later that

[1] The Supreme Court added, "Fair regard for the principles which the Georgia courts have enforced in numerous cases and for the constitutional commands binding on all courts compels us to reject the assumption that the courts of Georgia would allow this man to go to his death as the result of a conviction secured from a jury which the State admits was unconstitutionally impaneled. Cf. Moore v. Holohan, 294 U.S. 103, 349 U.S. at 391.

evening, and after several hours of questioning, he volunteered to show the police where the hotel was, and was taken to the city to locate it. At one point during the ride, which will be discussed at greater length under (3) infra, he said: "I am not going to show you any more," but later, without any threats, promises or inducements having been made to him, he said: "You fellows have been nice to me. I will show you where the apartment, where the hotel room is." When they came to the hotel, Hall gave the officers the number of his room, and after the evidence squad had gone in he said that they would find the clothes there. They also found the cash and checks taken in the robbery, but, as we shall see in the discussion under (3) below, none of this material was shown to Hall until after he had made his confession. Upon consideration of all the evidence in the record, I conclude (1) that Hall has not shown that the search was illegal, and (2) that no strong reasons or special circumstances exist in this case to prevent the application of the general rule stated in *Whitley v. Steiner*, that Hall has forfeited his right to challenge the search.

For each of the foregoing reasons, I conclude that the use of the material obtained in the search does not entitle petitioner any relief in this case.

(3)

Voluntariness of the Confession.

Hall contends that his oral confession and other admissions were not voluntary because he had been denied the right to counsel by the police, because material seized in the hotel room was used to obtain the admissions, and for other reasons.

The voluntariness of the confession made by Hall was submitted to the jury in a fair charge to which he took no exception. The question of due process with respect to the confession was argued to and decided by the Court of Appeals on appeal from the conviction. 223 Md. at 168 et seq., 162 A. 2d at 756 et seq. The testimony upon which

petitioner now relies was recited by the Court of Appeals, 223 Md. at 163 et seq., 162 A. 2d at 754 et seq., but the alleged denial of the right to counsel does not appear to have been stressed by petitioner's attorneys, who relied on other arguments. At the UPCPA hearing and on the application for leave to appeal therefrom, petitioner contended "(b) that he was denied the right to counsel when questioned by police shortly after his arrest and gave a damaging statement, which was used against him and which could not have been obtained from him if he had then had counsel." The Court of Appeals held: "Conviction (b), we think, was finally adjudicated on the prior appeal, and even if it were not, it was waived." 224 Md. at 664, 168 A. 2d at 374.

To the extent that the decision of the Maryland Court was based on a conclusion that Hall was not denied the right to counsel when questioned by the police and that the damaging admissions were legally obtained, that contention should be reviewed by this court on the merits; to the extent that the decision was based upon waiver, it may not be so reviewable. *Whitley v. Steiner*, 4 Cir., 293 F. 2d 895, and cases cited therein.

The absence of counsel during prolonged police interrogation prior to arraignment does not itself violate due process of law. *Crooker v. California*, 357 U.S. 433; *Cicenia v. Lagay*, 357 U.S. 504, but it may be a factor in determining whether or not a confession was coerced. *Culombe v. Connecticut*, 367 U.S. 568; *Reck v. Pate*, 367 U.S. 433.

It has been held in a large number of cases that, regardless of a finding of voluntariness by judge or jury in a state proceeding, it is the duty of the federal court in considering a petition for a writ of habeas corpus to make its own independent determination of whether the confession was voluntary. *Thomas v. Arizona*, 1958, 356 U.S. 390, 393; *Brown v. Allen*, 1953, 344 U.S. 443, 507-508; *Stein v. New York*, 1953, 346 U.S. 156, 182; *United States v. Jackson*, 2 Cir., 1958, 256 F. 2d 7, 9, cert. den. 358 U.S. 908; *United States v. La Vallee*, 2 Cir., 270 F. 2d 546, cert. den. 361 U.S.

950. However it is not necessary nor indeed proper for the federal court to retry the issue in every case.

There is little basis in the evidence for the contention that Hall was denied the right to counsel by the police. He did not suggest it in his testimony when he took the stand at the trial on the question of the voluntariness of his confession, nor did he mention it in his testimony before Judge Raine at the UPCPA hearing. The evidence on this point is confined to the uncontroverted testimony of the police officers at the trial. The evidence at the trial is set out at length in the opinion of the Maryland Court, 223 Md. at 164 et seq., 162 A. 2d at 754 et seq., but some items should be noted here. Hall approached the officers at the scene of the crime on the afternoon after its commission and asked if they had found any fingerprints. He gave his name voluntarily, and said that he knew the victim and her husband well and frequently came to their tavern. More importantly, he said that he had been there on the previous night. Later that evening the officers arrested Hall at another tavern. When the officers appeared Hall said that he knew they were coming and told the proprietor, "They think I did it". He was taken "in custody for investigation" and was told that he was being investigated as to a possible connection with the Gaff murder. At the station, where he was questioned from about 7:45 P.M. to midnight, with time out for coffee, etc., the questions dealt principally with his activities during the week or so he had been in Baltimore, and with his new suit, about which he had given misleading information. When it appeared that he had given the wrong name for the hotel where he was staying, he volunteered to show the police where it was. About midnight they started to look for it and for a restaurant he said he had visited. At one point

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*Rogers v. Richmond, 357 U.S. 220, and 365 U.S. 534, dealt with a particular situation, where the state courts had applied a clearly erroneous and unconstitutional standard for determining the admissibility of a confession. The Supreme Court did not abandon the general rule stated above. In the case at bar the charge to the jury stated the proper constitutional test applicable to the points raised by the defendant.

during the ride Hall said that he would show them where the restaurant was but would not show them where his hotel was, and then said, "I think I ought to see a lawyer". The officers told him, "That is your privilege", but Hall did not ask them to stop or to allow him to call a lawyer. The officer further testified that "he did not ask for a lawyer"; instead, after a period of silence Hall said, "You fellows have been nice to me. I will show you where the apartment, where the hotel room is". And he did so. When he testified with respect to the confession Hall agreed that he had "been treated nice." No threats or promises were made.

While the evidence squad was in the hotel, about 1:00 A.M., Hall started crying and said, "I am not afraid to die, I am afraid of going to hell. * * * They are going to find the clothes when they get up in the room." The officer asked Hall if he was willing to tell them about it. Hall agreed and said that they would take him to a station he would tell them just what happened. Hall was then taken to the Parkville Station. On the way he said, "I don't know why I did it." At the station he made a long, oral statement, in which he admitted robbing the tavern, carrying a loaded gun, and binding and gagging Mrs. Gaff. He said that after taking the money he went to the bar and drank four of five shots of whisky, and then noticed that Mrs. Gaff had gotten the gag loose, that she was hollering for help. Hall said that he was not sure what happened then. "I must have killed her but I don't know."

After the statement was taken Hall was detained at the station, where he was seen that same morning by an attorney hired by his father.

I find that Hall was not denied the right to counsel by the police.

No material seized in the hotel room was used to obtain the confession from him, although Hall must have realized what the police probably had found in his room. Only after he had made his first admissions, and after his confession had been taken down in question and answer form

by a stenographer, was he asked to identify the clothes, cash and checks which were seized at the hotel.

After considering all of the points and arguments made by counsel for petitioner, I conclude that the oral confession and other admissions were voluntarily made and that their admission in evidence did not deny petitioner any constitutional right.

An order will be entered remanding petitioner to the custody of respondent.